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LAW REPORTS*.

III.—PRECEDENTS.

(*Continued from page* 125, Vol. XLVII.)

Dicta of English Judges and decisions of Scotch, Irish and American Courts are grouped by Professor Salmond under the heading of "Persuasive Precedents" to distinguish them from binding decisions of English Courts which form authoritative precedents. All these are entitled to great respect, but as Jessel, M. R. observed in a case with reference to dicta no Judge should allow them or any number of them to affect his judgment. They stand more or less on the same footing as text-books. Truth to say, they belong to quite a different category from precedents proper. An exception, however, is made in favour of old recognised dicta of eminent Judges which have got into text-books and have settled conveyancing and practice for a long time (23 Ch. D. 49, per Jessel, M.R.). These receive the same consideration as precedents. Dicta or obiter dicta, as they are called, have received a certain amount of abuse though that is the way law is generally made. A thinker in advance of his times or blessed with more clear thinking than the rest makes a fruitful suggestion or a bold generalisation, sending it forth more or less as a feeler and repeated, it creates an atmosphere in its favour and ultimately it is accepted as law though when it was made for the first time, the general feeling was one of novelty and consequent dissatisfaction. The way in which dicta at one time became law at another may well be illustrated by the case in *Dashwood* v *Magniac*, (1891) 3 Ch. 306. While dealing with waste,

*The third of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

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Jessel, M. R. stated that cutting down timber by a tenant for life amounted to waste except in one case, *viz.*, in the case of timber estates—which are cultivated for periodical croppings. Really it was a dictum and there was little or no authority in support of it. Kay, L. J. showed this satisfactorily but nevertheless Bowen and Lindley, L. JJ. adopted it as the law. The words of Bowen, L. J. in this connection are very interesting :—" The instance to which the legal principle is now for the first time adopted by this Court may be new," said his Lordship, " but the principle is old and sound and the English Law is expansive and will apply old, old principles if need requires it to new contingencies. Just as in America, the law of water-courses and waste has modified itself to suit the circumstances of the enormous rivers and wide tracts of uncultivated forest, so the English Law accommodates itself to new forms of labour and new necessities of culture ; it favours the profitable holding of land. In a case like the present good sense borrows accordingly the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine and applies to the more novel case of timber plantation which is cultivated for periodical croppings and which forms a substantial item of yearly revenue to the owner of property." On account of their novelty generally these dicta have acquired a bad reputation and have been somewhere defined as " a gratuitous opinion, an individual impertinence which whether it be wise or foolish, right or wrong bindeth none, not even the lips that utter it." Notwithstanding this cynical reference, a close perusal of the law reports must satisfy anybody the great debt the orderly development of law owes to these dicta —how the dicta of eminent Judges like Jessel, Cairns and Selborne and coming to more recent times of Lords Macnaghten and Parker have been taken up and made the foundation of many a new and illuminating precedent. The question as to how much of a judgment is dictum and how much binding precedent is at times a matter of very great difficulty and we shall dwell on this point later. Opinions of Judges delivered at the bar of the House of Lords stand on the same footing as dicta. Irish and Scotch decisions on points where the law in England and those countries is the same have also no authority as precedents, (1922) 1 A. C. 186 ; 45 Ch. D. 62, though they are treated with great respect. An exception is

recently made in favour of the decisions of those Courts (the case was one of a unanimous decision of the Court of Session of Scotland) on the construction of Statutes which have operation in both the countries (1911) 1 Ch. 459 ; (1923) 3 K. B. 398. Viscount Haldane did not, however, feel himself bound by a decision of the Court of Session in Scotland when hearing an English appeal though on the construction of the Workmen's Compensation Act. As there is more common ground between England and Ireland and as also some of the eminent English Judges have been Irish Judges at some time of their life, Irish cases are more cited and commented on than Scotch cases. The decisions of American Courts are also of course not binding on English Courts. Yet as Cockburn, C. J. observed in 5 C. P. D. 305, " the sound and enlightened views of American lawyers in the administration and development of law except so far as altered by statutory enactment, derived from a common source with our own entitle their decisions to the utmost respect and confidence on our part." (6 A. C. 249). At one time, more American cases used to be cited than now. In 42 C. D. 330, Lord Halsbury deprecated the practice in these terms : "We should treat with respect the opinion of eminent American lawyers on points which arise before us but the practice which seems to be increasing of quoting American decisions as authorities in the same way as if they were decisions of our own Courts is wrong. Among other things it involves an enquiry which often is not an easy one whether the Law of America on the subject in which the point arises is the same as our own. " American cases are still cited—American authorities like Story and Kent more often than American decisions—but are generally cited either as matters of history or comparative study or on questions of private international law, maritime law or prize law or when on any point English authority is meagre and the question falls to be decided on principle.

As I have said before, the only thing that binds in a case is the principle on which it is decided (13 Ch. D. 785) and in fact the only use of a case is the establishment of a principle (13 Ch. D. 712). If a case lays down no principle or if no principle can be extracted out of a case, the case is useless as an authority. As a decision on facts even a House of Lords' decision is not binding unless, of course, the facts are identical (1892) A. C. 208. The distinction has been very pointedly referred to in numerous cases relating to con-

struction of documents. Ordinarily, a decision on the construction of a document is not binding but a decision on the principle of construction is binding 13 Ch. D. 493 ; (1922) 1 A. C. 425. The case is different where the question involved is the construction of a term of art, or a word which by judicial interpretation has acquired a particular meaning (23 Ch. D. 203) or the subject of construction is a document of common form. The judgment of Jessel, M. R. on this topic has become a classic. In 10 Chancery Appeals 397—his judgment was the judgment appealed against—he said, " No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document, that is to say, I think it is the duty of a Judge to ascertain the construction of the document before him and not to refer to the construction put upon a document perhaps similar but not the same. The only result of referring to authorities on such a subject is confusion and error. In this way, that if you look at a similar instrument and say that a construction was put upon it and that it differs only to such a slight degree from the document before you that you do not think that the difference is sufficient to alter the construction, you miss the real point of the case which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction but the Judge who decided may have thought that the very difference would be sufficient to alter the meaning of the document. You have in fact no guide whatever and the result, especially in the case of wills, has been remarkable. There is first document A and a Judge formed an opinion as to its construction. Then came document B and some other Judge said that it differed very little from document B, not sufficient to alter the construction, therefore, he construes it in the same way. Then comes document C and the Judge compares it with document B and says it differs very little and therefore he shall construe it in the same way. And so on the construction has gone on until we find a document which is in totally different terms from the first and which no human being would think of construing in the same manner but which has by this process come to be construed in the same manner. "

Somewhat similar considerations apply to cases which merely apply a well-known principle. Says Lord Haldane :—

"When a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstance and to erect a previous decision into a governing precedent merely on this account. The consideration of cases which turn on particular facts may often be useful for edification but it can rarely yield authoritative guidance." He regarded this view of the true limits of authority was of special importance where as in the case he had to deal with, *viz.*, the rule as to clog on the equity of redemption, the principle to be applied arises in the elastic jurisdiction of a Court of Equity and has been established simply as an instrument to give effect to a well-defined and governing purpose. He deprecated the tendency of recent decisions to lay undue stress on the letter of the principle. There is room for very considerable difference of opinion on the question as to whether a rule of law has become rigid and incapable of further expansion or whether it is still elastic and capable of being applied to varying circumstances with suitable modifications. In the very matter dealt with by Lord Haldane, Lord Davey is accused of having thought that the rule had become crystallised in the particular expressions used in certain of the earlier authorities. In (1891) 3 Ch. 367, Lord Bowen and Lindley, L. JJ. thought that the rule which applied to open mines was capable of further expansion. Lord Justice Kay—no mean authority—thought otherwise. Where the principle has acquired that rigidity, then, as Lord Sumner says in (1917) A. C. 41, "In the case of a legal system like ours a principle cannot be said to be truly part of the law merely because it would be a more perfect expression of imperfect rules which, though imperfect, are well established and well defined." And this is the meaning of the caution applied by Lord Halsbury in *Quinn* v. *Leatham*, (1901) A. C. 506 :— "I entirely deny" says his Lordship, "that (a case) can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that the law is not always logical."

On a somewhat similar reasoning, Courts have felt themselves justified in taking a certain amount of freedom in cases relating to public policy. In (1894) A. C. 553, Lord Wat-

son said, "A series of decisions based upon grounds of public policy (however eminent the Judges by whom they were delivered) cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to and for promoting the interests of its commerce, must as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England at least, it is beyond the jurisdiction of the Courts to mould and stereotype national policy. Their function in a case like the present brought before them is, in my opinion, not necessarily to accept what was held to have been a rule of policy a 100 or 150 years ago, but to ascertain with as near an approach to accuracy as circumstances permit." Here again, Lord Bowen thought that a statement made in certain cases that a general restraint of trade was bad was statement of the rule itself while the House of Lords thought that those cases were but applications of the general principle that unreasonable restraints were bad and if the changed conditions made general restraint reasonable, the Courts were not precluded from considering them as such. As Lord Macnaghten said :— "It does not seem to me to affect the question in the very least how often the dictum may be found repeated if on the one hand it is not accompanied by any reason or explanation and on the other if it appears without any authoritative statement that the proposition has become a rule, which was neither to be questioned nor explained." The last sentence gives an indication as to when the principle becomes rigid. When a rule has been authoritatively laid down in certain terms, the mere fact that different reasons have been given at different times for the rule does not affect the binding nature of the rule nor does it entitle the Court to go behind the rule. As said in (1917) A. C. 406 at 454 :—"If a maxim expresses a positive rule of law once established, though long ago, time cannot abolish it nor disfavour make it obsolete." This rule has been thus stated in 8 Bingham 557 :—"Where a rule has become settled law it is to be followed although some possible inconvenience may flow from strict observance of it or although a satisfactory reason for it is wanted or although the principle and policy of the rule may be questioned." But there is a point at

which this rule may have to be relaxed and rules of law held to be obsolete when for instance there has been such a complete change of circumstances that the reasons on which they are founded have ceased to exist and it would be unreasonable to apply the old rule. As Chief Justice Willes said in a case :—" When the nature of things changes, the rules of law must change too. When it was holden that deer was not distrainable it was because they were kept principally for pleasure and not for profit. " (Willes, p. 51). This is expressed in the maxim " *Cessante ratione legis, cessat lex.* " The American Courts have shown a much greater disposition to apply this principle than the English Courts and the Indian Courts are following the American precedent and the Privy Council has, in a way, approved of this disposition, or at any rate, the critical attitude towards certain of the rules of English Law which are manifestly coloured by English history and English conditions.

Several cases, all dealing with the same general topic, although with dissimilar aspects of it may, by their combination, establish a general rule which is broader than the doctrine of any one of the cases taken by itself and broad enough to include the novel case to which it is applied. As observed by Brett, M. R. in *Heaven* v. *Prender*, 49 L. T. N. S. 357, "The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises, there must be a more remote and larger premise which embraces both of the major propositions. " But this process of generalisation to produce the right result must be careful and exact. " The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all the qualifying circumstances is a very peculiar and difficult one. The opinion of the Judge, apart from the decision, though not exactly disregarded, is considered extra-judicial and its authority may be got rid of by any suggestion which can separate it from the actual result. Unless, therefore, a proposition of law is absolutely necessary for a decision, however emphatically it may have been stated, it passes from the province of authority to that of mere literature.

If the principle of any case is found to be beneficial, the principle is extended. If the principle does not meet with approval and it is too late to overrule it, it is

confined within strict limits. This is how the Court of Appeal dealt with a case of that sort in (1891) 1 Ch. 268. There, Lindley, L. J., dealing with *Doe* v. *Biggs*, 2 Taunton 189, said :—" I do not think it is a sensible decision. I do not think that case could possibly be decided that way if the question arose for the first time and I am not disposed to extend it. On the other hand, I do not wish to shake titles and I shall do precisely what my predecessors have done, leave the case where it is. It is a rock ahead that everybody knows. I am not prepared to extend that case. "

It is a matter of great difficulty at times to make out what exactly is the *ratio decidendi* of a particular case, especially when a number of Judges take part and each delivers a separate judgment or when a number of principles are referred to in justification of the conclusion arrived at. Where there is a clear majority giving a particular reason, then there is no difficulty, the reason given by the majority will be the *ratio decidendi* binding. If there is no ascertainable common principle, if the judgment lays down a conclusion of law, then that conclusion of law will bind, but if no conclusion of law is reached, then there is no binding element in the judgment. If the judgment gives two reasons for the conclusion, both of them will bind. It is not open to subsequent Judges to accept one of them and reject the other. As observed by Lord Macnaghten in (1901) A. C. 184 :—" It is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere obiter dictum simply because there is also another ground upon which standing alone, the case might have been determined. " At times, there is also considerable difficulty in saying what portion is *ratio decidendi* and what portion mere dicta. For instance, "where a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative and when he distinguishes the case before him by pointing out that there was no fraud, therefore the fraud imputed did not exist, that is not one of the things which can be described as mere obiter dictum. It is a part of the law which is guiding the judgment and part of the law he is bound to expound in the judgment he is pronouncing. " The hypothesis of fact on which the case is decided by the Court or where it is a decision by a majority, the majority view has proceeded, must be accepted ; it is not permissible to substi-

tute for it the view as to facts which, according to the subsequent Judge, is the true view. "It is a mistaken opinion that nothing in a case except the result arrived at is binding. All the propositions assumed to be true and all the grounds for the conclusion considered and deliberately decided by the Court as leading up to final conclusion reached are as effectively passed as the final conclusion." (44 L. R. Am. An. 579). A proposition assumed or decided by the Court to be true to establish the ultimate proposition is equally an authority. It will be found that most of the questions that confront one in dealing with this matter have their counterpart on the question of *res judicata* nor is it to be wondered at, for, as I told you already, the rule as to precedent is only a branch of the rule of *res judicata* and the rules laid down in ascertaining the binding elements in a previous decision will be of assistance in ascertaining the points binding in a previous judgment, making allowance for the necessary distinction that exists, *viz.*, that in the case of precedents, it is only the issues of law that bind. All observations on matters that do not directly but only incidentally arise in the case or are merely given by way of illustration or explanation or are collateral to the main question at issue are obiter and if the question was one of *res judicata*, would not have bound the parties in a subsequent suit.

There are two views as to the points on which an appellate judgment will be binding when some questions have been decided in favour of the appellant and some in favour of the respondent. The narrower view is that if the judgment is reversed, the point found in favour of the respondent become immaterial and unauthoritative and similarly, if the judgment is confirmed, the points found in favour of the appellant become immaterial. But this view has not much support. The prevailing view is that all the points finally presented and arising in the case for decision are points on which the decision given would bind. The foregoing will remind one of somewhat similar discussion on the question of *res judicata*, where, however, opinion seems to be heavily weighted on the other side.

There is a certain kind of dicta called by some American text-writers *gratis dicta ;* that is to say, after the case is decided, the Court proceeds to give expression to its opinion on a point discussed but not necessarily arising in the case for

the guidance of the lower Courts on future occasions. Though not binding decisions, the weight attached to them is considerably more than to ordinary dicta. The Privy Council has been indulging a great deal in this kind of dicta and as that tribunal, and for the matter of that, even the practitioners practising before that tribunal are rarely informed as to the details of Indian Law, such statements have been found to be somewhat embarrassing (*see* 48 Bom. 411 ; 39 All. 437). Their Lordships recently found fault with the Bombay High Court for not attaching enough weight to one of such dicta (*see* 48 Bom. 433).

We often find the word *semble* in headnotes prefacing certain statements made by the reporter. It indicates either that the statement was made by the Court upon a point not directly arising but more or less as an intimation as to what it would have done if the point directly arose or that it is a statement by the reporter of the point decided but that the point is not free from obscurity. In the former case, it is mere dictum ; in the latter, it may be a binding decision if the Court in the subsequent case agreed with the reporter's view.

The Court's opinion upon a point actually involved does not, of course, become a dictum because the actual judgment is ultimately rested upon some other ground or grounds. But if the Court bases its decision on only one of the points though it expresses an opinion on other points also, the decision on the other points would not be authoritative but would be regarded only as obiter. The decision must have been rendered on an actual case and not delivered upon a hypothetical set of facts in which case the decision would not be of any binding authority. For it is not the opinion of the Judges that counts but their opinion as leading up to a decision. An advisory opinion by the Supreme Court of a State in America in response to a question propounded by the various executive or legislative departments under the statutes or the constitution is not accorded the authority of a binding decision in that country. It is doubtful if the English Courts would accept the distinction, though for purposes of appeal, the Privy Council has recently held that such opinions cannot be regarded as judgments.

The principle of constructive decision is also recognised to a certain extent in the case of precedents. As Lord Dune-

din puts it in the recent case of *Brij Narain* (46 M. L. J. 223): "When a long series of cases extending over a long period of time when parties were represented by eminent counsel are decided in a way, where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad." The same line of reasoning is not always adopted, for instance, the Privy Council did not accept it when it was pressed upon them that appeals had been accepted in many cases of land acquisition without demur and should therefore be taken as impliedly held to lie by the Privy Council. In this connection, the well-known observation of Halsbury, L. C. in *Quinn* v. *Leathem* also are pertinent :—"Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expression which may be found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found." The other is that "a case is only authority for what it actually decides." If the view of Lord Halsbury were strictly followed, we should have had in English Law only "myriads of isolated instances and a wilderness of precedents." It is the attempt of Judges to generalise and to extend the principle once established to conditions similar that has introduced even the amount of harmony and scientific cohesion which it possesses.

There are some maxims in connection with precedents which are of very considerable importance. "*Jus dicere et non jus dare*" which means as Alderson, B. put it, "My duty is plain—it is to expound, not to make the law, to decide on it as I find it not as I may wish it to be." (7 Ex. 54). "*Stare decis et non quieta movere*," *i. e.*, "to stand by matters decided and not to stir up points set at rest." "*Omnio innovatio plus novitate perturbat quam utilitate prodest,*" "every innovation occasions more harm by its novelty than benefit by its utility." Another is "*Communis error facit jus,*" "a common mistake makes a right or becomes law." These maxims and sayings represent the conservative element in precedents. But even conservative lawyers, while asserting that a former decision should be followed, are prepared to make an exception in the case of manifestly absurd or unjust judgments. When a decision is questioned, the degree

of consideration and deliberation upon which it was made the rank of the Court as of inferior or superior jurisdiction which established it, the length of time during which it has been acted upon as a rule of property or practice or otherwise becomes imbedded in the actual affairs of mankind, are matters that weigh with the Court that is called upon to overrule it. The antiquity of the decision and the practice of mankind in conducting their affairs are conclusive factors in upholding the older view though questionable. It is said that a Court of Appeal should not overrule a decision not being manifestly erroneous and mischievous which has stood for some time unchallenged and from their nature and the effect which they may be reasonably supposed to have produced upon the conduct of a large portion of the community as well as of Parliament itself, in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognised law—Thesiger, L. J., 15 Ch. D. 336 ; Jessel, M. R. in 9 Q. B. D. 352. In (1895) 2 Q. B. 365 it is said :—" Where there is a decision more than 200 years old in respect of a subject-matter constantly arising in practice, the Court does not overrule it unless absolutely obliged to do so. " " Where an old case is contrary to principles of the general law, the Court of Appeal ought not to shrink from overruling it. But when an old decided case has made the law on the subject (it was a case as to solicitor's authority) the Court of Appeal ought not to interfere with it. " (9 Q. B. D. 352). " Where there has been a deliberate unappealed decision of a Court with regard to the effect of a condition of a common form of contract which has been known to all persons who have to deal with the subject-matter and has been acted upon for 18 years, it has been always the legal practice of even Courts of error to follow such decisions even though they would not perhaps have given the same decision had the case been originally before them " (13 Q. B. D. 355). Similarly where under a rule of construction however unreasonable in itself, a certain meaning has for a long time been given to a technical term, it may be necessary to continue to apply the rule rather than departing from it, disturb titles." (1914) A. C. " I need hardly say, " said Lord Selborne in 3 A. C. 765, 787, " that the opinion of the profession on a point of everyday occurrence in which they are constantly asked to advise is a very weighty authority. A Court of Appeal should

be cautious before determining that a decision frequently considered and always acquiesced in, was wrong and if from the time which has elapsed and the nature of the point (as for instance a point in conveyancing law) there is reason to believe that rights have been regulated and arrangements as to property made on the basis of the decision it may be right to uphold it even though convinced that it was originally wrong. In such cases *communis error facit jus* applies. But if the occasions on which the question might arise are rare, the principle does not apply." As pointed out by Earl Cairns in 9 P. D. the principle does not apply to penal law or law relating to ecclesiastical discipline. Nor does the principle apply where the decision has not stood wholly unquestioned or where subsequent decisions have disclosed the weakness in the reasoning or where the reason given has not been consistent. It was on this ground that the Privy Council felt no hesitation in the Pittapur case in overruling the early Madras decisions relating to the powers of the holder of an impartible estate in Madras. Similarly their Lordships refused to apply this principle to the case of an only adopted son. They based their judgment on two grounds, first because in either view they had to overrule the course of decisions in one Court or other. Secondly, they said, "People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they chose and so with titles." It is a matter of some satisfaction that their interpretation of the law results in that course which causes the least amount of disturbance.

A parallel line of reasoning has been adopted also in the case of construction of Statutes. In (1919) A. C. 874, the well-known case as to the validity of gifts for masses, Lord Buckmaster thus summarises the result of the authorities:—"The construction of a Statute of doubtful meaning once laid down and accepted for a long period of time ought not to be altered unless your Lordships could positively say that it was wrong or productive of inconvenience. Secondly, the decision upon which title to property depends or which by establishing principles of construction or otherwise form the basis of contracts ought to receive the same protection. Thirdly,

decisions that affect the general conduct of affairs so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained or payments needlessly made or the position of the public materially affected ought in the same way to continue. I cannot find however that they compel acceptance as accurate doctrine plainly outside a Statute and outside Common Law when no title and no contract will be shaken. No person can complain and no general course of dealing can be altered by the remedying of a mistake. For over 80 years, Roman Catholics have been unlawfully restricted in the disposal of their property. That seems to me no reason why the restrictions should continue to be imposed." In the same case Lord Birkenhead said :—" If there were in fact an unbroken line of authorities dating back 300 years then it would have been a matter for grave discussion whether the house in accordance with well-recognised principles would consent to break the chain. The authorities, however, are only uniform in result. Some depend upon Statutes, some on principle that no religion other than that by law established can be recognised and protected by the Courts while others depend upon misunderstanding of ancient decisions." In these circumstances, he felt free to lay down and enforce his own conclusion. The principle on which the construction of old Statutes is upheld is thus stated by Lord Campbell in 19 L. J. Q. B. 279 :—" For them there would be no safety or liberty if it could be successfully contended that all lawyers and statesmen (in the case of the latter by not leaving the words unrepealed) have been mistaken for centuries as to the true meaning of an old Act of Parliament." *See* (1908) A. C. 1. Or as Lord Watson said in L. R. 5 H. L. 304 :—" If we find a uniform interpretation of Statute upon a question materially affecting property and perpetually recurring and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding the interpretation. Disagreeing with that would merely be shaking rights and titles which had been founded through so many years upon the conviction that that interpretation is the legal proper one and one which will be least departed from." If there are ambiguous expressions in an Act passed a long time ago, it is legitimate to refer to the construction put upon those expressions throughout a long

course of years by the unanimous consent of all the parties interested as evidencing what must presumably have been the intention of the Legislature at that remote period. As said in L. R. 3 P. C. 605 though neither contrary practice nor disuse can repeal the positive enactment of a Statute a contemporaneous and continuous usage is of the greatest efficacy in law for determining the true construction of obscurely worded rules. Before, however resort can properly be had to this what has been called *contemporanea expositio* it is essential to show that the interpretation relied upon has been distinct and has been substantially uniform." (1916) 2 A. C. 439, per Lord Haldane. These considerations obviously have no application to modern Statutes. In the absence of considerations above referred to, the House of Lords has, in several cases, interfered with the construction put upon Statutes for a very long time.

A distinction is also made between a construction in favour of the Crown and against it. So in (1922) 2 A. C. 27 it is said :—" Where a decision which limits the right of the Crown has long been unquestioned far more practical weight attaches to this consideration of lapse of time than if the decision were the other way. Decisions in favour of the Crown may often go unchallenged not because their correctness is generally recognised but because no private person can face the cost of disputing them." In (1915) A. C. 1100, their Lordships of the Privy Council overruled a course of decisions in Ceylon extending over 44 years as regards the construction of an ordinance requiring writing for partnership agreements. Say their Lordships, " If the parties choose to disregard so ordinary and so simple a formality as the ordinance requires, there is no hardship in leaving them to take the consequences, nor is it in every case sound to misconstrue a Statute for fear that in particular instances some hardship may result."

A further question that often arises is as to how far precedents in any department of law remain useful or authoritative after the passing of Statutes in respect of them. In the case of codifying Statutes, this is what Lord Herschell says and that is the accepted view :—" I think the proper course is in the first instance to examine the language of the Statute, to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law and not

to start with inquiry how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with the view. If a Statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on the point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of as before, by roaming over a vast number of authorities in order to discover what the law was extracting it by minute critical examination of the prior decisions dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence." "But," added his Lordship, "I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or again, if in a Code of Negotiable Instruments, words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might be well put upon them in the Code." In the case of the Indian Codes which are admittedly based upon the English Law, the relevant point of time at which the state of the law in England is to be investigated is the law as it was interpreted at the time of the passing of these Codes and not the law as it has been subsequently interpreted. The rule above enunciated as to the use of antecedent law does not apply to merely amending and consolidating Statutes in which case the previous state of the law is a legitimate background for the Statute and must influence its construction. So also where the Statute is re-enacted in identical terms or in similar terms decisions on the prior Statute would be strictly relevant.

I need hardly say that the overruling of a case is not like the repealing of a Statute though there is some attempt made in America to assimilate the two. The effect of the overruling is not to alter the law but only to declare that the law was always otherwise—in the language of Blackstone, not to declare the law laid down by a decision to be bad law but that

it was never law (*see* 48 C. 300 P. C.). Where the over-ruling of the previous decision is due to the incorporation of any custom that has since grown (where such a thing is possible) the case is one of alteration of law and would bear close resemblance to repeal of Statutes. It sometimes becomes a question, as in the case of Statutes, whether the over-ruling of a case has the effect of reviving the case which had been overruled by it. The answer would depend upon the ratio of the new decision, whether it amounts to a re-affirming of the principle of the old decision or the substitution of a principle at variance with the principle of the former decision.

Many of the considerations which weigh with Courts when they are called upon to overrule a case are of value when the question is whether a precedent which is of the persuasive kind should be followed. The special knowledge or experience of the Court which passed the decision or made the observation, the approval the decision had at the hands of the profession and the text-writers, the length of time that has elapsed since the judgment has been rendered, the fact that the judgment is supported by sound reasoning, the likelihood of the statement of the law having been accepted and acted upon in the country, the number of cases in which the decision has been followed, the nature of the question involved, *e. g.*, a general rule of property or contract,—all these are considerations that incline a Court to follow a ruling which is cited to it. The weighing between various persuasive precedents is an every-day occurrence in America where there are numerous States with independent system of Courts and, though in a less degree, here in India where the various High Courts deal with the judgments of each other more on the footing of persuasive precedents than of authoritative precedents.

The vice of the law based upon precedents is that it is left to the "casual exigencies of litigation to determine what parts of it should be filled up and what left incomplete and when." A case may have been wrongly decided. The party may not be rich enough to take the case in appeal or for a hundred other reasons, the case may not go to the Appellate Court for a long time. And when a point is finally raised before the Court of Appeal, it might be too late to interfere with the decision. Although in theory, the growth of law by precedents is natural, in practice it makes law un-

systematic and leads to the growth of many an excrescence on the body of the law which mars its beauty and perfection. The whole process is thus beautifully described by Bryce in his Studies of Jurisprudence. "Observe how the English System works," he says, " a decision is given perhaps hastily or by a weak Court which in a little while especially after other similar cases have arisen is felt to be unsound." There is a general wish to get rid of it but it is hard to do so. People have begun to act on the strength of it, it has found its way into the text-books; inferior or even possibly co-ordinate Courts have followed it; conveyances and agreements have been drawn on the assumption that it is good law. The longer it stands the greater its weight yet the plainer its unsoundness. Cautious practitioners fear to rely on it because they think, it may some day be overruled yet as they cannot tell when or whether that will happen they dare not disregard it. Thus the law becomes uncertain but also needlessly complex and involved. So later Judges feeling the unsoundness of the principle which this mischievous case has established, endeavour to narrow it down as far as possible and surround it by a set of limitations and exceptions which confuse the subject and perplex the student. The matter may have one of three ultimate issues. Either lapse of time and the unwilling acquiescence of Judges put its authority beyond dispute. As Mr. J. W. Smith says of a famous old case, Dumper's case, " The profession have always wondered Dumper's case but it is now only too firmly settled to be questioned in a Court" or else after a while, the point is carried to a Court of higher rank which has the courage to overrule the erroneous decision and resettle the law on a better basis or possibly though this rarely occurs, a statute is passed declaring the law in an opposite sense to that unlucky decision. But it may be long before the second solution is found partly because Judges are chary of disturbing what they find, holding that it is better that the law should be certain than that it should be rational and fearing to pull up some of the wheat of good cases with the tare of the bad case, partly because, it will be good while before a litigant appears willing to incur the expense of carrying the point to the higher and more costly tribunal. The third solution is even less to be relied upon for the legislature is busy and cares very little about the theoretical perfection of the law. Even when the bad decision is got

rid of, a considerable measure of harm is found to have been done. The authority of the other cognate decisions might be impaired and shaken. It was at one time thought that all these evils could be got rid of by codifying the law but the extravagant expectations formed of them have not been justified and as a result there is a little enthusiasm left for codification now. Although recently there has been codification as to law of property in England under the guiding care of Lord Birkenhead which it is claimed has simplified conveyancing very considerably, but the necessity felt for the amending Statute even before the Statute has come into force shows the difficulties in the way of successful codification.

SUMMARY OF ENGLISH CASES.

CLOVER CLAYTON AND COMPANY LTD. *v.* HESSLER AND CO., (1925) 1 K. B. 1.

Practice—Third party proceedings—Applicability—Claims for indemnity and contribution—Marine insurance—Insurers if can be added.

Third party procedure is limited to claims for indemnity or contribution and in a claim by a firm of ship repairers against certain persons who ordered repairs to be done, insurers who have underwritten a policy insuring the defendants against the loss which gives occasion to the plaintiffs' claim cannot be joined as third parties.

PHIPPS AND COMPANY, LTD. *v.* ROGERS, (1925) 1 K. B. 14.

Landlord and tenant—Notice to quit—Clear and unambiguous—Burden of resolving questions of law thrown on tenant—Notice invalid—Months—Lunar or calendar.

The landlord of certain premises gave his tenant notice to quit " on the earliest day the tenancy could be legally terminated by valid notice to quit " and the agreement of tenancy provided for three months' previous notice. *Held* by the majority of the Court of Appeal (*Scrutton, L. J. dissenting*) the notice was invalid as it placed the duty on the tenant to determine questions of law as to when the tenancy could be legally determined, as to what would be a valid notice to quit and as to whether " months " referred to were lunar or calendar.

Held also *per curiam* the expression "months" under the Common Law means lunar months unless the contrary is indicated by the context, by statutory provision or by recognized exceptions.

Per Bankes, L. J.—It is not necessary that a notice to quit should be clear and unambiguous in its expressed terms provided it can be rendered clear and unambiguous by the application of the maxim *Id certum est quod certum reddi potest.*

WILCOCK *v.* PINTO AND COMPANY, (1925) 1 K. B. 30.

Income-tax—Non-resident person—Trade within the United Kingdom—What amounts to—Assessment in the name of agent—When allowed.

An Egyptian firm carrying on business at Alexandria did business in England through one X. The firm used to send instructions to X that they had so much to sell and that he may sell it at or above a named price, the discretion being left to him to choose the buyer ; or X would obtain orders which he would send to Alexandria, and the firm would authorize him to accept the order or refuse it. Whenever contracts were entered into, the firm would draw upon the buyer's bank in England a bill for the price and then discount it with their own bank in Egypt, who would then send it forward with the bill of lading attached and present it to the buyer's bank in England. On a question arising, whether the firm was liable to income-tax, *held,* reversing the decision of Rowlatt, J., in (1924) 1 K. B. 304, the firm was exercising a trade in England and was therefore chargeable to income-tax in the name of their agent X.

Per Scrutton, L. J.—The question whether a person exercises a trade is a question of fact. One important matter to which Courts attach importance is where the contract was made ; other matters are where the goods are delivered and the price paid. Case-law discussed.

THE KING *v.* JAMES ST. ALBAN PAUL, (1925) 1 K. B. 77.

Criminal Law—Habitual offender—Sentence of preventive detention—Discretion of Court—Prevention of Crimes Act, S. 10 (1).

Even where in convicting a person of a substantive offence the jury is of opinion he is a habitual criminal, the Court has to exercise a discretion as to whether a sentence of preventive detention should be passed. The Court must be of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years.

ATTORNEY-GENERAL *v.* AVELINO ARAMAYO AND CO., (1925) 1 K. B. 86.

Jurisdiction—Submission to—Income-tax—Special Commissioners—Appeal from decision—If can afterwards contend that Commissioners had no jurisdiction—English Company, foreign board and local agents—Assessment in the name of agent.

An English Company was formed to work mines in a foreign country. The actual mining operations were carried on by a board in that country and the minerals sold in England through a firm of agents. The Company applied to be assessed to income-tax by the Special Commissioners, who thereupon made an assessment on the foreign Board in the name of the English firm of agents. The firm of agents appealed against the assessment and failing there applied for a special case being stated. *Held,* they could not after having invoked the jurisdiction of the Commissioners in the matter of appeal and stating a case be heard to say that there was no jurisdiction in them to assess at all. The case is analogous to a foreigner who is not amenable to the jurisdiction of the English Courts not being allowed to object to the jurisdiction if he has voluntarily submitted to it by appearance without protest.

There is no power to assess to income-tax the foreign Board, which was the agent of the English Company, in the name of its English firm of agents.

BOSWELL *v.* CRUCIBLE STEEL COMPANY, (1925) 1 K. B. 119.

Landlord and tenant—Covenants in lease—"Landlord's fixtures"—What are.

A "fixture," when used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made

part of the house itself in the course of its construction. "Landlord's fixtures" covers all those chattels which have been so affixed by way of addition to the original structure, and were so affixed either by the landlord, or, if by the tenant, under circumstances in which they were not removable by him.

HAMBROOK *v.* STOKES BROTHERS, (1925) 1 K. B. 141.

Negligence—Nervous shock—Fear of injury to child—Remoteness of damage—Extent of duty.

The servant of the defendant left a motor-car at the top of an incline unattended and without stopping the engine. The car started off and paced down the incline at a furious speed. A mother, who a few moments before had seen one of her children off to school down the incline, saw the car rushing and on account of her anxiety and fear suffered a serious nervous shock, as a result of which she died. In an action by the husband for compensation, *held* by the majority of the Court of Appeal (*Sargent, L. J.* dissenting) there was no remoteness of damage, and the fact that the shock was brought about by fear of her child's safety and not her own did not disentitle the plaintiff to damages. Case-law on responsibility for causing nervous shock reviewed.

Sasson (Marie) v. Sasson (Maurice), 94 L. J. (P. C) 13 : (1924) A. C. 1007.

Marriage—Dissolution of—Non-Christian British subjects—Divorce by proper tribunal—Recognition of British Court.

A Jewish husband and wife, who were British subjects residing at Alexandria were granted a dissolution of marriage in accordance with Jewish Law by the Great Rabbinate at Alexandria. Subsequently one of them sued in a British Court for a declaration that the divorce was effectual to dissolve the marriage. *Held*, though the British Court itself had no jurisdiction to dissolve the marriage, it has jurisdiction to declare rights and is bound to acknowledge the validity of a decree good according to the religious law of the non-Christian subject. Thus though "*talak*" is not a ground which would be good by English Law, British Courts have often given effect to Mahomedan divorces.

In re, A DEBTOR : PETITIONING CREDITORS, *Ex parte* 94 L. J. Ch. 42.

Bankruptcy—Assignment for the benefit of creditors—Acquiescence and recognition of deed—Non-assenting creditors if can treat as act of bankruptcy.

A person who was in involved circumstances agreed with his creditors to pay them in full by instalments and appointed a committee to supervise his business. His subsequent business also failed and he thereby incurred some new debts. The old debtors thereupon insisted on his executing a deed of assignment in favour of his creditors and this he did. He simultaneously sent to all creditors, including the new ones, a circular letter with a form of assent. One of the new creditors was a Company, and its Director attended the office of the trustee under the assignment, made an unqualified request to be included in the committee, attended a meeting on invitation, and took part in the discussions. Subsequently the Company petitioned for a receiving order, relying on the execution of the assignment deed as an act of bankruptcy. *Held*, the Company by the conduct of its Director had recognised the assignment deed to such an extent as to preclude them from relying on its execution as an act of bankruptcy.

BROWN *v.* LEECH, 94 L. J. K. B. 48.

Bastardy—Wife living apart from husband—Proof of non-access—Evidence of wife—Admissibility.

In proceedings instituted to prove that a certain child was a bastard, neither spouse can give evidence of non-access in any Court. The fact of non-access must be found on other evidence, and if the only evidence of non-access is that of the wife, any order based on that is bad.

In re, BEIRNSTEIN : BARNETT *v.* BEIRNSTEIN, (1925) 1 Ch. 12 : 94 L. J. (Ch.)

Sale—Vendor's lien—Mortgage—Difference between.

There is an essential distinction between a mortgage and a vendor's lien: the former is a security upon real or personal property for the payment of a debt or for the performance of an engagement, created by contract between the parties; whereas the latter is a charge arising by operation of law. No doubt

a vendor's lien is incident to a contract between the parties, but the contract to which it is incident is not a contract constituting the relationship of mortgagor and mortgagee,but a contract constituting the relationship of vendor and purchaser. Unpaid purchase money owing to a vendor cannot properly be called money secured to him on mortgage, though by virtue of the lien the same remedies are open.

BERNERS *v.* FLEMING, (1925) 1 Ch. 39.

Vendor and purchaser—Specific performance—Difference between parties as to construction of contract of sale—Court agreeing with purchaser's view—Effect on vendor's suit.

The vendor and purchaser of a building differed on the construction to be put on the contract to sell and as a result the sale was not completed. The vendor sued for specific performance, but the Court agreed with the construction put upon it by the purchaser whereupon the vendor claimed specific performance in accordance with that construction. *Held,* as the plaintiff was not at all times willing to carry out the contract as construed by the Court, his action must fail.

In re, NEVILLE : NEVILLE *v.* FIRST GARDEN CITY, LTD., (1925) 1 Ch. 44.

Will—Construction—"I forgive all debts owing to me"—If includes mortgages and amounts secured by loan stock.

The estate of a testator consisted of Government securities, redeemable debentures, debenture stock in companies, mortgages, charges, amounts secured on loan stock and loans made to friends and employees for starting them in business. A codicil to his will contained the clause "I forgive all debts owing to me." On a question arising whether the mortgage debts and amounts secured on loan stock fell within the clause in the codicil, *held* the word "debts" must be construed not in its legal sense but restrictedly ; that the expression "forgive" introduced a personal note and a distinction must be drawn between investments and moneys owing to him in a personal capacity. Hence the items of loan stock and mortgages were not released.

The meaning of a word is relative to the circumstances and occasion and date on which the word is used.

In re OLDHAM : HADWEN *v.* MYLES, (1925) 1 Ch. 75.

Will—Husband and wife—Identical wills—Property to go to the other on death—Identical alternative provisions—Fresh will by survivor changing alternative provisions—Validity of.

A husband and wife made wills in the same form under an agreement. Under the wills of each, the other was to get the property absolutely for life and thereafter certain provisions were made as to how the estate was to devolve. These provisions were the same in both the wills. The husband died first and under his will the wife took his properties. She remarried, and made a new will under which she disposed of her properties in a manner entirely different from that under the mutual wills. On the question arising whether she had power to do so, *held,* under the circumstances in which the mutual wills were executed, a Court cannot infer any implied trust preventing the wife's absolute powers of disposition and hence the new will was valid.

RAWLINSON *v.* AMES, (1925) 1 Ch. 96.

Part-performance—Doctrine of—Agreement to lease—Oral contract—Suit for specific performance.

In pursuance of an oral contract to lease, the landlord commenced a series of alterations in the lease premises and during the progress of alterations, the lessee visited the premises, and made suggestions which were all carried out by the landlord. Subsequently the lessee refused to carry out the contract and when the landlord sued for specific performance, the lessee pleaded the Statute of Frauds. *Held,* the various alterations carried out by the landlord at the request and as per directions of the lessee amounted to part performance and the defendant could not plead the Statute of Frauds. The basis and scope of the equitable doctrine of part performance discussed with reference to case-law.

EDWARDS *v.* PORTER, (1925) A. C. 1.

Husband and wife—Money lent to wife—False representation to lender that she was authorised by husband to borrow—Liability of husband—Tort connected with contract—Common Law rule and exception—Married Women's Property Act, 1882*—Effect of.*

A married woman made false and fraudulent representations that her husband was in need of money and had authorised her to borrow. Money so lent, she applied for her own use. An action was brought by the lender against both the husband and wife for damages for false and fraudulent representation. *Held*, affirming the decision of the Court of Appeal in (1923) 2 K. B. 538 the husband was not liable.

The Earl of Birkenhead and Viscount Cave based their decision on the ground that the effect of the Married Women's Property Act, 1882, was to do away with the common law rule as to the husband's liability for the wife's torts. The other members of the House (Viscount Finlay, Lord Atkinson and Lord Sumner) held *contra* on that point, but as the money was obtained under the fraudulent misrepresentation that the husband had authorised the wife to borrow, the tort was so intimately connected with the contract as to be part of the same transaction and hence the exception to the common law rule applied and the husband was not liable. Case-law reviewed.

SUTHERLAND *v.* STOPES, (1925) A. C. 47.

Libel—" Rolled up plea "—Exact scope of—Justification —Allegations of fact and expression of opinion—Verdict on— Effect.

What is known as the " rolled up plea " in an action of defamation is really not a mixed plea of justification and fair comment, but a plea of fair comment only. The expression is really a misnomer based on a misconception of the nature of the plea. The averment in such a plea that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. Nature and effect of plea explained with reference to case-law.

In an action for defamation, the finding of the jury was that the words complained of were true in substance and in fact, but that they were not fair comment. *Held* (by Lord Shaw and Lord Carson) the finding on the plea of justification was enough to entail a dismissal of the action.

Where the allegations complained of consist partly of statement of facts and partly of opinion, and the plea is one of justification, the proper question which ought to be left to the jury is whether the comments as well as the averments of fact were true. The breadth of such a plea considered.

WARD *v.* LAVERTY, (1925) A. C. 101.

Guardian and ward—Religious education of infants—Directions of deceased father—Welfare of children—Conflict between—Considerations determining—Separation of members of family.

A person belonging to the Roman Catholic Church married a lady who was prior to the marriage a Presbyterian. Shortly before the marriage she became a Roman Catholic. There were three children by the marriage. The husband took to drink and ceased to care for the family, whereupon the wife with the children went to her father's house, became a Presbyterian again and remained there till her death. The husband died first leaving a will which contained a direction that the children should be brought up in the Roman Catholic faith. After the wife's death, the paternal relations of the children applied for a writ of *habeas corpus* and wanted to take the children from their maternal relations who were all Presbyters, and who were bringing up the children in that faith. The eldest of the children, aged 11, had acquired strong Presbyterian leanings, while the others were too young to have any religious faith. *Held*, though the wishes of the father would generally prevail, it is the welfare of the children which ought to be the paramount consideration. It would be dangerous to unsettle the convictions of the eldest child, and the life of the father not being such as to entitle him to be called " a good and honest father " the balance of convenience was not to remove her from the custody of the maternal relations. As regards the younger children, no question of religious convictions arose, but it was not proper to separate them from their elder sister or bring them up in a different faith. The welfare of the children should prevail even over the wishes of the father.

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* COMPTOIR D'ESCOMPTE DE MULHOUSE, (1925) A. C. 112.

Banker—Foreign bank and English branch—Borrowing of money by English branch after depositing bonds as security—Payment of money—Suit for recovery of bonds—Defence that foreign bank had ceased and that the branch manager could not sue—If open—Estoppel.

The manager of the English branch of a Russian Bank under directions from the Head Office borrowed money on the deposit of certain bonds as security. Some years later the branch manager paid off the sums due which were accepted by the creditor, but as the latter refused to return the security, an action was brought by the manager in the name of the Russian Bank for return of the bonds. The defendant pleaded that as the Russian Bank had ceased to exist, the branch manager had no authority to bring the action. *Held,* (1) the defence was not open, but the proper course to adopt would have been to move the Court at an early stage to strike out the name of the Bank as plaintiff ; and (2) having accepted the money due, the defendant was estopped from disputing the authority of the branch manager.

In re ALLOTT : HANMER *v.* ALLOTT, (1924) 2 Ch. 498.

Perpetuities—Will—Annuity to daughter and then to her husband—Family arrangement—Powers of lease—Life of surviving husband contemplated—Power void.

By means of a will, the testator directed the trustees appointed thereunder to pay annuities for life to his daughters and after the death of the daughters to their husbands (if any) for life. After the death of the testator, a family arrangement was entered into in which the daughters were parties, according to which power of leasing the estate for periods not exceeding 99 years was given to the lessees and the trusts under the will were incorporated in the same. *Held,* as the power of leasing is exercisable at any time during the life of the surviving husband of a daughter, who will not necessarily be a person who was alive at the time of the family arrangement, it was one which would be capable of being exercised so as to create a new interest in the land for the first time after the perpetuity period had expired and hence was void as being contrary to the rule of perpetuities.

Per Warrington, L. J. :—If a power of this sort which is inserted in a settlement is capable of being put an end to or of itself comes to an end with the determination of the trusts within a period not affected by the rule against perpetuities, then the power is good although there are no express words limiting its execution to such period.

JOTTINGS AND CUTTINGS.

Contempt of Court.—One very salutary principle has emerged from the judgment in *Rex* v. *Editor and Publishers of the "Evening News"*; Ex parte *Hobbs* (Times, 11th instant), and that is to the effect that it is undesirable that a Judge in charging the grand jury should express any opinion whatever as to the guilt or otherwise of a prisoner against whom an indictment is to be preferred. On the other hand, the Court pointed out that there was no objection if the Judge merely intimated that the grand jury might on the evidence return a true bill. It was one thing to say that on the evidence which the witnesses for the prosecution would give before the grand jury a *prima facie* case would be made out, and that on such evidence the jury might find a true bill; but it was a very different thing to say that the accused in the opinion of the Judge was guilty and in fact ought to be found guilty by the petty jury. In the concluding words of his charge to the grand jury, the learned Recorder said :—" All you have to do is to see whether there is a bill against Hobbs, and probably it will not take you very much time to say that there is." The Court pointed out that that would have been a sufficient and satisfactory way of dealing with the whole matter, without any other reference to the case at all. But unfortunately the Recorder appears to have gone further.

—*The Law Journal*, 14th February, 1925, p. 134.

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The Privilege of Reports.—So far as the above case deals with substantive law, it is interesting, inasmuch as it decided that fair and accurate reports of proceedings before a grand jury are privileged. The Lord Chief Justice pointed out that it was now much too late in the day to argue that a newspaper was not entitled to print a report of a charge to the grand jury, and that it was within the knowledge of every one that such reports were published. As regards *Rex* v. *Fisher*, (1811) 2 Camp. 563, which was cited by counsel appearing in support of the rule as an authority for the proposition that it is libellous to publish a preliminary examination taken *ex parte* before a Magistrate, it is to be observed that that case can no longer be regarded as an authority in view of such later cases as the well-known cases of *Usill* v. *Hayes*, (1878) 3 C. P. D. 319, *Lewis* v. *Levy*, E. B. & E. 537,

where it was held that reports of proceedings before a Magistrate did not lose their privilege by reason of the fact that the proceedings were not final, and *Rex* v. *Gray*, 10 Cox, 185, which decided that reports of proceedings at the preliminary investigation at a Police Court, which resulted in a committal, were also privileged. On this point reference might usefully be made to Fraser on *Libel and Slander* (5th Edn.), at p. 203, where the learned author says :—"Having regard to the case of *Usill* v. *Hayes*, (1878) 3 C. P. D. 319, it is now clear law—although it was at one time doubted—that reports of *ex parte* proceedings also obtain a qualified privilege, whether such proceedings result in the discharge by the Magistrate of the party charged as in *Curry* v. *Walter*, (1796) 1 B. & P. 525 and *Lewis* v. *Levy*, (*ubi supra*) or not." One cannot but agree with the decision arrived at by the Court in *Rex* v. *Editor and Publisher of the "Evening News"*; Ex parte *Hobbs*, (*Times*, 11th inst.) that "it would not be right to punish a newspaper for reporting a charge where the real sting of the criticism is to be directed against the charge itself."

—*The Law Journal*, 14th February, 1925, p. 134.

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Free Legal Advice for the Poor.—The Home Secretary makes an interesting announcement as to an enquiry he is conducting into the means of effecting a regular dispensation of advice in their affairs to that class of the community which so often needs it, but can so rarely afford to pay for it. An illustration of the want is occasionally seen in the public application to a local Court made by some poor person in distress; and the Home Secretary's proposal, so far as it is yet defined, is to enlist the services of the Magistrates and to establish their availability for consultation at regular times and outside Court hours. Without in any way criticising such a scheme, it may be questioned whether the possibility has yet been fully explored of obtaining such gratuitous services from the legal profession? Here and there already exist organisations for achieving this purpose, and the development of the system, upon a very much wider and more ambitious scale, might well be feasible if initiated from so authoritative a quarter. Persons without the means to pay for them may already obtain the best services of the most competent and reputed surgeons and physicians, and it is part of the routine and honour of the

medical profession that this should be so. But the more eminent counsel and solicitors are very far from being so accessible. And why ? Because they have never been asked to render themselves available ; at any rate, there exist no sort of legal " hospitals, " nor has any national movement been promoted to found them. Time enough to suspect the profession of a lack of philanthropy when a call has been made upon it to which it could make a practical response ! A review of the energy which is devoted by lawyers, from the greatest to the least, to unpaid services and to administrative work in charitable organisations, suggests that the necessary services are easily available. But experience also shows that some deliberate and carefully-contrived organisation is essential if gratuitous legal aid is to be thus made available to those who really need it.

—*The Law Journal,* 14th February, 1925, p. 136.

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The Bankruptcy Report.—The report of the Bankruptcy Committee has now been issued. The Committee was appointed as a Departmental Committee by Mr. Sidney Webb, the then President of the Board of Trade, in June of last year, " to consider and report what amendments of the Bankruptcy Act, 1914, recent experience has shown to be desirable, more particularly in regard to the provision for the discovery and punishment of offences. " The Chairman was Mr. E. W. Hansell. In accordance with the terms of the reference, the report is mainly concerned with offences against the Bankruptcy Law, and numerous suggestions are made for the amendment of the Act of 1914 in this respect. The chief are that the various acts and defaults of a debtor, which are criminal offences if done within six months of the presentation of a bankruptcy petition, shall be made offences if done within 12 months ; and, subject to certain qualifications, that failure to keep proper books of account shall be an offence on a first bankruptcy, and not, as now, only on a second ; and that Courts of Summary Jurisdiction shall have power to inflict up to 12 months' imprisonment, instead of only six months as at present. Probably this last recommendation gives too much power to such Courts. There is also an important suggestion that in the case of every bankrupt the Court should review his conduct and pronounce on his discharge as soon as practicable after the trustee has been re-

leased, so that the status of the debtor may be known. And it is interesting to note that the Committee considered the nature of "fraudulent preference," held by the Courts to depend on the dominant motive in the debtor's mind [see *Sharp* v. *Jackson*, (1899) A. C. 419], and considered whether it ought not to depend on the effect of the act. But, notwithstanding the practical difficulty in deciding on intention and the frequent litigation on the subject, the Committee decided not to recommend any change.

—*The Law Journal*, 21st February, 1925, p. 158.

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Medicine and the Law.—More than once in recent days Lord Hewart has given us cause to reflect that, great as the gain was to the English Bench from his promotion to be Lord Chief Justice, the loss to public life was perhaps greater still. His speech at last Saturday's dinner, on the occasion of the Hunterian Festival of the Royal College of Surgeons of England, combined the most delicate humour with the most profound erudition and was a perfect example of its particular type of oratory. The intimate alliance between the medical and the legal professions, notwithstanding that ever-present *casus belli* as to the true definition of "insanity," is a matter upon which we have often dwelt; and it was a happy incident that, to a distinguished company, including some notable lawyers, Lord Hewart should have been selected as the chief speaker and gave his best. It must at once be added that the reply of Sir John Bland-Sutton, President of the College, was of equal point and merit. Indeed, the occasion is one not readily to be forgotten; its value is doubled by the fact that it happened in the interval between the hearing, by the Court of Criminal Appeal, of the case of *Rex* v. *Bateman* and the giving of the considered judgment which is in prospect. The issue of this case, a charge of criminal negligence amounting to manslaughter in a doctor's treatment of a patient, has already been decided by the quashing of the conviction and the discharge of the appellant. But the exposition of the true principles of law applicable to the case is postponed. No doubt we shall have occasion to refer to them later. Meanwhile it is inevitable to note with the highest satisfaction that Medicine and the Law are so intimately co-operating in their devotion to the cause of humanity.

—*The Law Journal*, 21st February, 1925, p. 158.